In the Missouri Court of Appeals
Western District

ANDRO TOLENTINO,	**)**	
Appellant,	**)**	
v.	**)**	**WD75115**
	)	**FILED: April 2, 2013**
STARWOOD HOTELS & RESORTS	**)**	
WORLDWIDE, INC., et al; WESTIN	**)**	
HOTEL MANAGEMENT, LP,	**)**	
Respondent.	**)**	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
THE HONORABLE W. BRENT POWELL, JUDGE

BEFORE DIVISION TWO: LISA WHITE HARDWICK, PRESIDING JUDGE, KAREN KING MITCHELL, JUDGE AND JAMES M. SMART, JR., SENIOR JUDGE

Andro Tolentino appeals the circuit court's grant of summary judgment in favor of Starwood Hotels & Resorts Worldwide, Inc. and Westin Hotel Management, L.P (collectively "Respondents"). The circuit court held that Respondents could not be liable as a joint employer under the Missouri Minimum Wage Law for Tolentino's unpaid wages when it was the unforeseeable criminal acts of another joint employer that caused Tolentino's wages to fall below the minimum wage. For reasons explained herein, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Starwood Hotels & Resorts Worldwide, Inc. owns Westin Hotel Management, L.P., which in turn operates the Westin Crown Center in Kansas City, Missouri ("Hotel"). Respondents employ many of their own housekeepers for the Hotel. However, to ensure that the Hotel has enough housekeepers during periods of high occupancy, Respondents also contract with temporary staffing agencies to provide housekeepers on an as-needed basis.

From 2005 until 2009, Giant Labor Services, Inc. ("GLS") was one of the staffing agencies that provided the Hotel with housekeepers. Pursuant to a contract with Respondents, GLS was designated an independent contractor to provide housekeepers that were employees of GLS, not Respondents. Under the contract, Respondents did not compensate the housekeepers provided by GLS. Instead, Respondents paid GLS, which in turn could pay its housekeepers in any manner that complied with applicable law. The amount Respondents paid GLS was calculated based on the number of rooms cleaned by GLS's housekeepers. During the time period relevant to this appeal, Respondents paid GLS at a rate of $5.00 per room.

In January 2008, federal law enforcement officials — including officials from the U.S. Department of Labor, U.S. Department of Homeland Security, and the Internal Revenue Service — contacted Respondents to discuss their contract with GLS. Upon meeting with the federal officials, Respondents learned for the first time that GLS was under investigation for alleged criminal activity. Respondents asked whether they should terminate their contract with GLS, and the federal officials instructed Respondents to continue business as usual. Over the next two years, Respondents

worked with law enforcement in the investigation and eventual prosecution of GLS and its owners.

Around February 2008, while Respondents continued to use GLS's services at the government's request, Tolentino began working as a housekeeper for GLS at the Hotel. In April 2008, Respondents notified GLS that they no longer wanted Tolentino to clean at the Hotel because he failed to work in a timely manner. Consequently, GLS reassigned Tolentino to a different hotel.

GLS paid Tolentino based on the number of rooms he cleaned. During the pay period of April 12, 2008 through April 26, 2008 — the last pay period during which Tolentino worked at the Hotel — Tolentino earned $427.00 prior to deductions, reflecting 122 rooms cleaned at a rate of $3.50 per room. Tolentino's net pay for this last pay period was $372.34 after deductions for federal and state income tax, social security, and Medicare. However, GLS then deducted the remaining $372.34 from Tolentino's paycheck for H-2B visa fees. Consequently, Tolentino's paycheck from GLS for the final two weeks he worked at the Hotel was for $0.00.

On May 6, 2009, GLS and its owners were indicted on federal charges of racketeering, human trafficking, fraud in foreign labor contracting, money laundering, extortion, and visa fraud. Respondents were never accused of having any role in or knowledge of GLS's criminal conspiracy. In fact, federal law enforcement concluded that Respondents had been "defrauded" by GLS. While the charges against GLS were eventually dismissed due to the company’s lack of assets, its principals were convicted of labor racketeering based, in part, on their practice of withholding earned wages for

visa fees. The federal court also awarded Tolentino restitution in the amount of $3,150.00, which the criminal judgment identified as Tolentino's "total loss."

On April 21, 2010, Tolentino filed a class action suit in the Jackson County Circuit Court against Respondents on behalf of himself and other similarly situated housekeepers. The petition alleged that Respondents were joint employers with GLS and failed to comply with Sections 290.502 and 290.505 of the Missouri Minimum Wage Law ("MMWL") in paying Tolentino and other housekeepers.[1] Tolentino based his MMWL claim on two theories. First, Tolentino asserted that GLS's practice of paying its housekeepers based on the number of rooms cleaned — as opposed to hours worked — resulted in Tolentino not being lawfully compensated for his hours worked. Second, Tolentino claimed that he was deprived of minimum wage and overtime compensation because of the visa fees that were deducted from his paycheck.

On August 4, 2011, Respondents moved for summary judgment on Tolentino's MMWL claim. Respondents argued that Tolentino provided only two days of housekeeping services at the Hotel that fell within the MMWL's two-year statute of limitations. Respondents also asserted that, as to the two days not barred by the statute of limitations, Respondents were not liable under the MMWL because they were not Tolentino's joint employer. Additionally, in response to Tolentino's first theory of his case, Respondents asserted that, even if GLS's practice of paying its employees $3.50 per room could be attributed to Respondents, Respondents were still entitled to summary judgment because Tolentino "cleaned a sufficient number of rooms to be paid above the minimum wage for the hours worked." Translating Tolentino's final pay stub

[1] All statutory references are to the Revised Statutes of Missouri 2000, as updated by the Cumulative Supplement 2011, unless otherwise indicated.

into an *hourly* rate, Respondents explained that, because Tolentino worked 55 hours during the final pay period, the $427.00 earned prior to deductions reflected a wage rate of $7.76 per hour. Missouri's minimum wage at the time was $6.65 per hour. Responding to Tolentino's second theory of his MMWL claim regarding GLS's deduction of visa fees, Respondents argued that they could not be held liable for GLS's criminal acts.

On March 8, 2012, the circuit court granted Respondents' motion for summary judgment.[2] In its decision, the court initially found that genuine issues of material fact existed as to whether Respondents, along with GLS, were joint employers of Tolentino. Nevertheless, the court granted summary judgment for Respondents, finding that even if Respondents were joint employers of Tolentino, Respondents were not liable under the MMWL for two reasons. First, the circuit court rejected Tolentino's argument that the pay-per-room arrangement caused him to be paid below minimum wage, finding that "[Respondents] adequately compensated [Tolentino]" under the arrangement and, thus, "[Respondents] did not violate the MMWL." Second, after determining that the only reason Tolentino was not adequately compensated was "because GLS illegally deducted fees from [his] paycheck," the circuit court held that "[Respondents] cannot be held responsible for the unforeseen criminal activity committed by GLS." Tolentino appeals the grant of summary judgment.

II. ANALYSIS

A. STANDARD OF REVIEW

[2] Tolentino also brought claims for breach of contract, unjust enrichment, and quantum meruit. The court granted summary judgment in Respondents' favor on all claims, however, only the MMWL claim is relevant to this appeal.

Appellate review of summary judgment is essentially de novo. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc. 1993). A movant's right to summary judgment differs significantly depending upon whether the movant is a claimant or defending party. *Id.* at 381. "A defendant may establish a right to judgment as a matter of law by showing that there is no genuine dispute as to the existence of each of the facts needed to support the movant's properly pleaded affirmative defense." *Realty Res., Inc. v. True Docugraphics, Inc.*, 312 S.W.3d 393, 398 (Mo. App. 2010).

B. INTRODUCTION TO JOINT EMPLOYER LIABILITY

In order to pursue a claim against Respondents for unpaid wages under the MMWL, Tolentino must prove that Respondents were his "employer." Both the MMWL and the Fair Labor Standards Act (FLSA) define "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." § 290.500(4); 29 U.S.C.A. § 203(d) (2007). State regulations provide that "except as otherwise provided in Missouri law, the interpretation and enforcement of the Missouri Minimum Wage Law will follow the FLSA regulations." *Fields v. Advanced Health Care Mgmt. Services, LLC*, 340 S.W.3d 648, 654 (Mo. App. 2011); 8 C.S.R. 30–4.010(1) (2004). The FLSA expressly recognizes that an employee may be employed by more than one entity at the same time. 29 C.F.R. § 791.2(b) (2003) (describing various joint employment situations); See *Fields*, 340 S.W.3d at 653 n. 3 (recognizing joint employer liability). "[J]oint employers are responsible, both individually and jointly, for compliance with" the MMWL. *See* 29 C.F.R. § 791.2(a); *Donovan v. Agnew*, 712 F.2d 1509, 1511

(1st Cir. 1983) (joint employers are "jointly and severally liable under the FLSA for unpaid wages").

In the instant case, as recognized by the circuit court, "genuine issues of material fact exist as to whether [Respondents], along with [GLS], were joint employers of [Tolentino]." However, because the circuit court found that Respondents were entitled to summary judgment even if they were joint employers of Tolentino, the circuit court presumed that Respondents were joint employers of Tolentino for purposes of ruling on the motion for summary judgment. Given that presumption, we proceed to consider the grounds on which the court granted summary judgment.

C. ISSUES ON APPEAL

Tolentino contends the circuit court erred in granting summary judgment in favor of Respondents as a joint employer on two grounds. First, Tolentino argues that a joint employer cannot satisfy its legal obligation to an employee through payments to a second joint employer. Second, Tolentino asserts that a joint employer is liable for underpayment of wages regardless of the fact that the underpayment of wages was caused by another joint employer's unforeseeable criminal acts.

1. Payments to Joint Employer

In granting Respondents' motion for summary judgment, the circuit court found that, under the pay-per-room arrangement, "[Respondents] adequately compensated [Tolentino] as required by the MMWL." On appeal, Tolentino argues that Respondents'

payments to GLS did not absolve them of their presumed joint employer liability to Tolentino for the wages he earned. This argument, however, is non-responsive because there is nothing in the circuit court's order and judgment to suggest that Respondents' payments to GLS were a separate basis for granting summary judgment.

The summary judgment order merely referred to Respondents' payments to GLS as background information to show how the pay-per-room arrangement worked: Respondents' agreed to pay GLS $5.00 for each room cleaned, and then GLS paid Tolentino at a rate of $3.50 per room cleaned. During the relevant period when Tolentino worked 55 hours at the Hotel, he earned $427.00 for cleaning 122 rooms at $3.50 each, for an effective pay rate of $7.76 per hour. This pay rate exceeded the State's minimum wage requirement of $6.65, and the circuit court thereupon found that Tolentino was "adequately compensated" under the MMWL. The court then determined that GLS's illegal deduction for the visa fees was the only reason Tolentino did not receive the compensation he earned. Because Respondents' payments to GLS were not a basis for granting summary judgment, we deny Tolentino's first ground for appeal and proceed to address his second challenge to the circuit court's holding that "[Respondents] cannot be held responsible for the unforeseen criminal activity committed by GLS."

2. Unforeseen Criminal Acts of Joint Employer

Tolentino contends the circuit court erred in absolving Respondents for the misconduct of GLS under the MMWL because joint employer liability "contains no exception for nonpayment of wages … being an unforeseeable, criminal act." Neither party has cited, nor has our independent research revealed, any case in which a joint

employer has been either absolved or held liable under the MMWL or FLSA for another employer's criminal acts. In fact, although our research found an abundance of authority in determining whether a joint employment relationship exists, there was no further guidance as to the extent of a co-employer's liability in the wage and overtime context once joint employment is established. Thus, the issue raised by Tolentino under his second ground for appeal is one of first impression.

Despite the lack of a clear exception under the applicable law, Respondents argue that to hold them liable for GLS's unforeseeable criminal acts would be contrary to: (1) the purpose of the MMWL and the joint employer doctrine; (2) principles of agency law; and (3) the law regarding strict liability. We address each of these arguments in concluding that the circuit court properly granted summary judgment in Respondents' favor.

(a) Purpose of the MMWL & the Joint Employer Doctrine

Statutes and regulations must be construed "to effectuate the intention of the legislature." *Brandsville Fire Prot. Dist. v. Phillips*, 374 S.W.3d 373, 378 (Mo. App. 2012). "Further, we will not construe a statute or regulation to produce unreasonable, oppressive, or absurd results." *Daly v. State Tax Comm'n*, 120 S.W.3d 262, 267 (Mo. App. 2003). "When determining legislative intent, the court should consider the history of the statute and the problem it sought to address." *Ross v. Whelan Sec. Co.*, 195 S.W.3d 559, 565 (Mo. App. 2006).

While the FLSA's enforcement provisions, as incorporated by the MMWL, "are intended to protect workers and their families, . . . [they are] also intended to protect the employers who comply with [the] terms [of the Act]." *Lerwill v. Inflight Services, Inc.*,

379 F.Supp. 690, 696 (N.D.Cal. 1974). The FLSA "is designed and intended as a shield to protect the unwary and not as a sword on which to impale an unsuspecting employer who is engaged in a business and honestly exercises a reasonable effort in good faith to comply with all the required provisions of such act." *Wirtz v. Harrigill*, 214 F.Supp. 813, 815 (S.D.Miss. 1963). Additionally, the purpose of the joint employment doctrine under the FLSA is to prevent employers from colluding to avoid paying overtime by claiming that any overtime work performed by an employee was for a "separate" employer. See Dep't of Labor Interpretative Bulletin No. 13 (1940); see also *Walling v. Twyeffort*, *Inc.*, 158 F.2d 944, 947 (2d Cir. 1947) ("Absent collusion between employers, a tailor could conceivably work 80 hours a week without being entitled to overtime pay, if he divided his time equally between two employers.").

Here, Respondents are not, as one commentator has phrased it,[3] "wage-chiselers." Quite to the contrary, Respondents fully complied with the provisions of the MMWL. The only reason Tolentino was not fully compensated was because of GLS's criminal act of deducting visa fees.[4] Respondents did not collude with GLS in its illegal activity, nor were Respondents even aware of GLS's illegal deductions. In fact, federal law enforcement concluded that, in executing its criminal scheme, GLS defrauded Respondents. Under these facts, we are unwilling to use joint employer liability as a sword to impose liability on Respondents for GLS's unforeseeable criminal acts. To do

[3] Richard J. Burch, *A Practitioner's Guide to Joint Employer Liability Under the FLSA*, 2 Hous. Bus. & Tax J. 394, 404 (2002).

[4] Tolentino takes issue with the fact that GLS was never actually convicted and the circuit court did not identify any criminal statute holding the nonpayment of wages to be a criminal act. However, as previously discussed, while the charges against GLS were dismissed because the company lacked assets, its principals were convicted of labor racketeering. There is no dispute that the convictions were based, in part, on the visa fees deducted from the wages of GLS employees.

so would be contrary to the clear intent and purpose of the MMWL and the joint employer doctrine.

(b) Principles of Agency Law

The circuit court's decision to absolve Respondents of liability for the unforeseen criminal acts of a joint employer is further supported by principles of agency law. The common law recognizes that a principal is responsible for its agent's acts and agreements if the agent acts with actual or apparent authority. *Pitman Place Dev., LLC v. Howard Investments, LLC*, 330 S.W.3d 519, 527 (Mo. App. 2010). "'Apparent authority' exists when a principal, either by its acts or representations, has led third persons to believe authority has been conferred upon an agent." *Id.*

In support of their position, Respondents cite to *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002). In *Arriaga*, Florida Pacific Farms (the "employer") hired a recruiter to help locate workers in Mexico and to arrange for their transportation to Florida. *Id.* at 1233–34. The recruiter utilized "contact persons" in Mexico to assist with the recruitment of workers. *Id.* at 1234. Some of the contact persons, without the employer's or recruiter's authorization or knowledge, charged recruitment fees to the hired workers. *Id.*

The workers brought an FLSA claim asserting that the employer's failure to reimburse the workers for their recruitment fees caused their wages to fall below the minimum wage.[5] *Id.* at 1231–32. The workers argued the employer was liable under

[5] The fact that the workers in *Arriaga* paid the fees on their own, while, in the instant case, the fees were deducted from Tolentino's paycheck, is insignificant. "[T]here is no legal difference between deducting a

the "apparent authority principle of the law of agency" for the fees that the "contact persons" charged to the workers. *Id.* at 1245. In rejecting the workers' argument, the Eleventh Circuit stated: "[T]he undisputed facts include[ ] no words or conduct of the [employer] which, reasonably interpreted, could have caused the [workers] to believe the [employer] consented to have the recruitment fees demanded on [its] behalf." *Id.* Thus, the court held that the employer was not liable for the recruitment fees. *Id.* at 1245–46.

Similarly, here, there is no evidence that Respondents did anything that could have reasonably led Tolentino to believe that they consented to GLS's illegal deduction of visa fees. Accordingly, to hold Respondents liable for the visa fees would be contrary to the principles of agency law. See *Lawson Rural Fire Ass'n v. Avery*, 764 S.W.2d 113, 116 (Mo. App. 1988) ("Statutes are to be construed in a way that synchronizes their meaning with the existing common law.").

Tolentino argues against this agency analysis, contending the use of such principles to interpret the FLSA "has been soundly rejected by the courts." However, he cites to cases that do not support this broad proposition; rather they stand merely for the principle that the scope of the employer-employee relationship under the FLSA is broader than under the common law. See, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (stating that the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles").

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cost directly from a worker's wages and shifting a cost . . . for the employee to bear." *Id*. at 1236; 29 C.F.R. § 531.35.

While the definition of "employee" is broader under the FLSA than under agency law, there is no authority prohibiting this court from looking to agency law for guidance on the particular issue before us: once an employer-employee relationship is established (or presumed), *to what extent can the employer be held liable for the acts of another joint employer*? In fact, "[i]n a case involving a federal statute that is silent as to the applicability of agency law, the Supreme Court has stated that the 'apparent authority theory has long been the settled rule in the federal system.'" *Arriaga*, 305 F.3d at 1244–45 (quoting *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 567 (1982)). Accordingly, in *Arriaga*, in determining whether the employer was liable under the FLSA for the fees charged by the contact persons, the Eleventh Circuit applied the common law rules agency, noting that "nothing in the FLSA seeks to displace the principles of agency law." *Id*. at 1245 n.24. Therefore, Tolentino's argument is unavailing, and we find that principles of agency law further support our conclusion that Respondents cannot be held liable for the unforeseen criminal conduct of GLS as their joint employer.

(c) Strict Liability

Finally, we find Respondents' reliance on strict liability case law persuasive. Respondents argue that even if 29 C.F.R. § 791.2(a) is read "so as to impose a sort of 'strict liability'" on a joint employer for the acts of another employer, under "strict liability case law and theory, there is no legal basis" for holding a joint employer liable for another employer's unforeseeable criminal acts.

In support of their argument, Respondents cite to *Pecan Shoppe of Springfield, Missouri, Inc. v. Tri-State Motor Transit, Co.,* 573 S.W.2d 431 (Mo. App. 1978). In

Pecan Shoppe, a motor carrier was transporting a shipment of dynamite in one of its tractor-trailers. *Id.* at 432. As the tractor-trailer was traveling on Interstate 44, one of carrier's employees, who was a member of the union and on strike at the time, fired three gunshots at the tractor-trailer from an overpass. *Id.* The gunshots caused a "tremendous" explosion, killing the tractor-trailer's driver and causing "heavy damage to nearby improved land." *Id.* The owner of the damaged land brought an action for damages against the carrier. *Id.*

The issue of first impression before this Court in *Pecan Shoppe* was whether strict liability applies to a common carrier engaged in transporting explosives. *Id.* at 434. The landowner argued that the theory of strict liability for abnormally dangerous activities applied because approximately fifty percent of the carrier's business consisted of hauling explosives. *Id.* The carrier, however, sought to "avail itself of those principles which exempt a common carrier" from strict liability for injuries caused by abnormally dangerous activities. *Id.* The carrier further argued that, even if it was strictly liable, it should not be liable for the unforeseeable criminal acts of its employee. *Id.*

After reviewing decisions from other jurisdictions that had dealt with the issue of whether a transporter of dangerous substances is strictly liable for injuries caused by their explosion, this court held that "the granting of a specific classification to a carrier should not create a liability where otherwise none exists." *Id.* at 435–39. This court further stated that, even if it were to hold transporters of dangerous substances strictly liable:

> In order for this court to uphold [the landowner]'s contention . . . . [T]his court would have to take the additional step . . . of invoking the doctrine of absolute liability where the undisputed evidence shows that the explosion was caused by the criminal act of a third person. This it is unwilling to do.

Id. at 438–39. While *Pecan Shoppe* falls outside the wage and hour context, it reflects our general reluctance to hold a party "strictly" liable for the unforeseeable criminal acts of another. See also *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co. L.P.*, 75 S.W.3d 247, 257 (Mo. 2002) ("A duty to protect against the criminal acts of third parties is generally not recognized because such activities are rarely foreseeable.").[6]

Here, similar to *Pecan Shoppe*, the undisputed evidence shows that the withholding of Tolentino's wages was caused by GLS's criminal acts. The undisputed evidence further establishes that Respondents were not aware, nor should they have been aware, of GLS's criminal deductions from Tolentino's paycheck. By the time GLS placed Tolentino at the Hotel, Respondents had been working with GLS for approximately three years, and there is no evidence in the record that Respondents had any notice GLS was withholding wages for visa fees. Although Respondents knew GLS was under investigation, Respondents had no knowledge as to why GLS was under investigation and, in fact, had been instructed by federal officials to continue business as usual with GLS. Under these facts, we are unwilling to hold Respondents liable for GLS's criminal acts. Accordingly, the circuit court did not err in granting Respondents' motion for summary judgment.

III. CONCLUSION

We affirm the circuit court's judgment.

LISA WHITE HARDWICK

[6] The circuit court, in holding that "[Respondents] cannot be held responsible for the unforeseen criminal activity committed by GLS," cited to *Ward Parkway Shopping*. The circuit court also cited to *Wellman v. Pacer Oil Co.*, 504 S.W.2d 55, 58 (Mo. banc 1973), which held an employer was not liable for its employee's "outrageous and criminal" acts, and *Henderson v. Laclede Radio, Inc.*, 506 S.W.2d 434, 437 (Mo. 1974), which held an employer was not liable for its employee's outrageous and unforeseeable acts.

, JUDGE